No. 10666.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FLORENCE DAVIS SMITH and HARVEY W. SMITH,
Appellants,

vs.

THE FEDERAL LAND BANK OF BERKELEY and FEDERAL FARM MORTGAGE CORPORATION,
Appellees.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

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APPELLANTS' REPLY BRIEF.

Jurisdiction.

Appellees claim that there can be no motion for new trial before the District Court and that the Order denying the Petition for Rehearing is not appealable. (Appellees' Br. pp. 2-3.) Appellants' Petition, filed on October 16, 1943, asked for a new trial, a rehearing and a motion to vacate the judgment. It was accompanied by the Affidavit of Appellants' own counsel setting forth three additional letters between Mr. Stone and Mr. Hoffman bearing on the question of waiver and asking that the case be re-opened for the consideration of these documents and to permit further oral testimony which was excluded at the hearing before the Conciliation Commissioner on September 3, 1942. [R. 74-83.]

Judge Beaumont, on October 16th, 1943, entered an Order stating that the Motion for New Trial, Petition for Rehearing and Motion to Vacate the Judgment had been seasonably presented and entertained. [R. 78.]

It is well settled that a District Judge on reviewing an Order of a Conciliation Commissioner, has the authority to consider additional evidence, and that he does not sit as an ordinary reviewing court.

Dunsdon v. Federal Land Bank, 137 Fed. (2d) 84.

It was Judge Beaumont's duty to reopen the case on one or more of the three types of relief sought in the Petition. Certainly the facts warranted a vacating of the Judgment on the ground of mistake, inadvertence or excusable neglect. (Rule 60, Federal Rules of Civil Procedure.)

I.

There Was No Waiver of the Right to Be Adjudicated Under (s).

In the six pages of Appellees' Brief (pp. 6-11), claiming an express waiver agreement, there is no answer to our claim (Op. Br. pp. 9-11) that conditions were set up in Mr. Hoffmann's reply of March 26, 1941, which were never at any time complied with and so there could never have been any meeting of the minds and therefore no agreement.

Indeed there is not even any comment by Appellees' counsel to the portions of Mr. Hoffmann's letter set out in italics in our Brief (pp. 9-10). Counsel asserts (p. 7), "The debtors withdrew their opposition and consented to the Conciliation Commissioner's order." They cite in

support of this only the Commissioner's Findings in the Order of February 9, 1942. The record shows that the only hearing before the Commissioner was held on March 12, 1941. All of the correspondence between the parties, both that relied on by Judge Beaumont as amounting to a waiver, and the three additional letters relied on by Appellants as showing conclusively that no waiver had been made occurred long after that hearing of March 12th and there is nothing to indicate that any evidence relating to such correspondence came to the attention of the Commissioner. Therefore, if we are correct in our view that the Order of February 9, 1942, was wholly void as not within the power of the Commissioner to enter, there is no evidence in the record to sustain Appellees' position.

We pointed out in our Opening Brief (p. 26), that the Commissioner's Order of February 9, 1942, was void and not voidable. While subdivision (o) of Section 75 contained the phrase "prior to the confirmation or other disposition of the composition or extension proposal," nevertheless, this section has been construed in more recent decisions to control as to matters arising in later proceedings under Section 75. (*Bastian v. Erickson,* 114 Fed. (2d) 338 at 140; *Schriever v. Oxford Building & Loan Ass'n.,* 116 Fed. (2d) 683, at 684.) Moreover, the case of *Bernard v. Johnson,* 314 U. S. 19, 86 L. Ed. 11, 62 S. Ct. 30, declined to pass on this precise question as not being necessary for a decision in that case (86 L. Ed. 20).

Appellees claim that Section 1(9) of the Chandler Act providing that a Referee may act as a Court gave the Conciliation Commissioner authority to enter the Order of February 9, 1942. Since subsection (o) of Section 75 of the Act states that the *"Judge" "must enter an Order,"*

there can be no doubt that any Order by a Commissioner permitting foreclosure entered prior to the confirmation or other disposal of an Extension Proposal would be void. We submit that under the authorities cited above, the same prohibition against the entry of an Order by a Commissioner applies here.

Counsel for Appellees insist (pp. 8-9) that Judge Beaumont held that the Possession Agreement did not constitute a waiver but merely supported his conclusion that there had previously been a waiver. Mrs. Smith's testimony and offers of proof (Appellees' Op. Br. pp. 11-13) clearly show that no such conclusion by the District Judge was justified.

Counsel are in the inconsistent position of stating in one breath that Judge Beaumont took into account the three additional letters set up by the Affidavit supporting the Petition for Rehearing, Motion for New Trial and Motion to Vacate Judgment and yet still insisting that those letters are not properly before this Court on Appeal (Appellees' Br. p. 9.)

It is further claimed that regardless of any claimed assurance made to Mr. Shirley by Mr. Percy Smith, both Mr. Shirley and Mrs. Smith were bound to have known what letters were and were not in evidence. This position is unsound. Mr. Shirley, who admittedly had substituted for another attorney, was justified in relying on Mr. Percy Smith's assurances, particularly since the Commissioner said he would not allow Mr. Shirley time to go

through the record. [R. 163.] Counsel proceed to go outside of the record and insist that these additional letters were available to attorney Shirley and that he did not use them because he did not consider them material. (Appellees' Br. p. 10.) This is not the fact. Present counsel for Appellants was retained on October 7, 1943. [R. 79-81.] The three additional letters between Mr. Stone and Mr. Hoffman were actually not obtained by Appellant, Florence Davis Smith from Mr. Stone until September, 1943, when received under a covering letter from Mr. Stone dated September 19, 1943, the original of which is available for presentation to this court. Mr. Stone there stated that he managed to get one day off from the Navy to make a trip to Porterville to get the papers requested.

Counsel for Appellees assert that Mr. Hoffman in putting in the phrase, "if Mr. and Mrs. Smith have not changed their minds," only meant letting the matter go any way that was satisfactory to Appellees and that he did not mean to refer to the filing of a Petition under subsection (s). Such an argument is entirely untenable since at all times, the principal alternative to letting the matter go by default would be to file under (s).

We submit that on the record, without the three additional letters set up by Affidavit, it is shown there was no waiver. The three later letters confirm the construction that no waiver occurred.

II.

There Was No Consideration for the Alleged Waiver.

Counsel for Appellees insist that there is no evidence in the Record to support Appellants' contention that the Randolph Marketing Company already had the authority to pick the grapefruit and retain the proceeds. They concede that Mrs. Smith did testify that there was no consideration but insist this was only a legal conclusion. (Appellees' Br. p. 10.) At the hearing on September 3, 1942, it was the duty of counsel for Appellees, if they were going to object to Mrs. Smith's statement, to ask to have it stricken as a mere legal conclusion. This they did not do, although at other points at that hearing, the record shows they made that precise objection which was sustained.

In any event there is direct evidence by Mrs. Smith that the Randolph Marketing Company was already handling all of the fruit under an Order of Court which therefore establishes that there was no consideration for the alleged waiver. This testimony [R. 129] is as follows:

> "Q. (By Mr. Shirley): * * * since 1937, when you filed, who has handled the picking and marketing of those crops? A. Randolph Marketing Company has until last November.
>
> Q. Was that pursuant to the order of the Court? A. Yes.
>
> Q. And what happened to the proceeds of those funds? A. They were handled through Randolph Marketing Company, and they were made agents to pay all bills incurred for operation, and * * * with any surplus to pay out on debts."

III.

Neither Mr. Stone nor Mr. McCormick Had Any Power by Admission to Waive the Right of Appellants to Go Under (s).

Appellants insist that cases cited under Point IV of our Opening Brief do not fit the facts in this case and that the language used in Mr. Stone's letter of March 21, 1941, to the effect that they (meaning Appellants) had concluded that they would let the matter go by default if the Randolph Marketing Company could be protected, is a complete answer to our position. On any theory, the letter of March 21, 1941, was not self-executing and at the most it was an offer that had to be accepted. As we have pointed out, it never was accepted but conditions and restrictions were imposed which were never carried out nor agreed to by appellants. Therefore there was no meeting of the minds. This is conclusively shown by the later correspondence.

Appellees have insisted (pp. 8-9) that Mr. McCormick's statement was proof that Appellants had previously waived. Certainly such an attempt to establish a waiver by admission is improper under the authorities cited in our opening brief.

IV.

The Right to Be Adjudicated a Bankrupt Under Subsection (s) Can Not Be Waived.

Appellees claim that the cases relied on by us cover only the invalidity of an agreement to waive the benefits of Bankruptcy where incorporated as a part of an original contract between the parties. They even attempt to distinguish the case of *Hepker v. Equitable Life Assurance Society,* 131 Fed. (2d) 926, on this theory. As pointed out on page 24 of our Opening Brief, the alleged agreement in the *Hepker* case occurred while they were under an (a-r) proceeding just as in our case and when the Circuit Court of Appeals said, "we think the statute and not the agreement made six months before bankruptcy must control," they meant by bankruptcy *going under subsection (s),* the precise point involved in this case.

Nor can the language of the Circuit Court of Appeals in *Trego v. Wright,* 111 Fed. (2d) 990, and *Federal Land Bank v. Morrison,* 133 Fed. (2d) 613, be so lightly brushed aside as counsel attempt.

Counsel quotes at length from *In re Denny,* 135 Fed. (2d) 184 as *the one case* establishing that the right to go under (s) may be waived. In that case the debtor filed an amended petition under subsection (s) and was so adjudicated. The question of waiver arose not on the matter of going under (s) but on whether after an appraisement and an application for reappraisement, the debtors could waive the right to such reappraisement and

make an agreement that the property might be sold if he did not redeem it at a given figure by a set date. This is an entirely different question from whether a debtor while under (a) to (r) can waive his right to file an amended petition under subsection (s).

On page 14, Counsel for Appellees state that the cases of *Borchard v. California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957; *Wright v. Logan,* 315 U. S. 139, 84 L. Ed. 443, 62 S. Ct. 508, and *Corey v. Blake,* 136 Fed. (2d) 162, "hold that after a debtor has properly amended under subsection (s) the statute prescribes an orderly procedure and that *the bankrupt and his creditors cannot substitute different procedure from that prescribed by the statute.*" (Emphasis ours.) At page 17 of their brief, counsel go on to say: "In the *Denny* case the bankrupt had waived his right to a reappraisal. This is not a prescribed procedural step which is mandatory under the statute."

With these two statements we agree.

The decision of this court in *Cole v. Home Owners Loan Corporation,* 128 Fed. (2d) 803, by a divided court, does not meet the test which Appellees have set up, since the procedure there held to be waived was one prescribed by the statute: but in any event that case is not persuasive on the question of the right to go under (s). The debtors were already under (s).

The claim (bottom of p. 17) that the public policy doctrine against waiver would mean "that every distressed

farmer who files under subsections (a-r) will ultimately be forced to liquidation or to buy the property at the value fixed by appraisers, or by the court" is simply specious. And the further claim that "this would prevent any voluntary settlement being made with creditors" and that one who had been adjudicated under (s) "would be precluded from filing a voluntary petition for dismissal under Section 59 (g) of the Chandler Act" is absurd.

Of course a farmer can make any voluntary settlement with his creditors he may wish, once he has amended his petition under Subsection (s) but he cannot under the holdings of the Supreme Court be deprived of his statutory right to go under (s), either with or without his consent.

After a farmer has filed under (a) to (r) and is attempting to work out an extension or composition agreement he is still in distress and under pressure from his creditors. If under that pressure he can be compelled to forego all right to go under (s), the whole of Section 75 would be largely made valueless. We respectfully submit that it would be clearly against public policy to hold that a farmer under such compulsion from his creditors could waive his right to be adjudicated a bankrupt under Subsection (s).

V.

Reply to Appellees' Points VI to X.

Appellees assert that the language of Section 75(s) is ambiguous in that it is not clear whether the debtor may feel aggrieved only *prior* to confirmation or whether he may feel aggrieved *during* the period of an extension or *after* the expiration of an extension. (Appellees' Br. p. 20.)

Because of this alleged ambiguity, counsel proceeds in the next ten pages to discuss at some length the history of the legislation generally and as indicated by legislative statements and committee reports.

The answer to all of this argument is that this Court's decision in *Cohan v. Elder,* 118 Fed. (2d) 850, in which certiorari was denied by the United States Supreme Court, 313 U. S. 583, 85 L. Ed. 1539, 61 S. Ct. 1102, held there was no ambiguity. This Court in that case said (page 851):

> "The revelant provision of subsection (s) is that 'any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, *or if he feels aggrieved by the composition and/or extension,* may amend his petition or answer, asking to be adjudged a bankrupt.' (Emphasis supplied.) In the plainest of language this provision extends to the debtor, as of right, the relief given him below. Compare *John Hancock Insurance Co. v. Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176."

On page 32 of Appellees' Brief, they rather naively concede that "it appears to be a rather general understanding on the part of debtors, creditors, conciliation

commissioners, and the District Courts in the Ninth Circuit, that the *Elder* case is authority for the proposition that debtors, who have received the full benefits of Subsection (a-r), may, after the expiration of the voluntary extension, wait until some creditor takes an affirmative step to terminate the matter, and thereupon amend under Subsection (s), . . ."

We respectfully submit that the reason all of these various groups have reached that "general understanding" is that most, if not all, of the arguments presented by Appellees in this case were presented to this Court by counsel for *Cohan* in the *Elder* case and overruled.

At page 31 of their brief in this case, counsel refer to the decision in *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 84 L. Ed. 176, 60 S. Ct. 221, making a long quotation from it including the paragraph as to the purpose of Section 75 being to give debtors "the chance to seek an agreement with their creditors, subsections a to r, and, *failing this,* to ask for the other relief afforded by subsection s."

This very passage was quoted at page 15 of Appellants' Opening Brief in this court in the *Elder* case and again at page 5 of the Reply Brief. It was again quoted in Cohan's Petition for Certiorari filed in the Supreme Court of the United States.

The undersigned prepared the Elder briefs in *Cohan v. Elder,* and there pointed out that in the *Bartels'* case the Court was talking about the two ordinary alternatives which arise, namely, an agreement under a to r or the filing of a petition for relief under subsection (s). The court did not have before it any necessity for construing the

language of a farmer debtor feeling aggrieved by the composition or extension. To interpret the language of the *Bartels'* case as covering every possible contingency would render that portion of subsection (s) relating to a farmer feeling aggrieved by a plan absolutely meaningless.

Appellees claim that since Appellants received a three-year stay and had fallen down on the payments under the proposed plan they could not be aggrieved factually or legally by the plan. (Appellees' Br. p. 33.)

The Record filed in this Court in the *Elder* case showed that on July 2, 1940, Cohan, the principal secured creditor, filed a Petition in the District Court for leave to sell the twenty acres on which Cohan held a trust deed, on the ground that the Elders had been unable to comply with the confirmed plan as modified and had failed to secure rehabilitation. [Cohan v. Elder, R. 66.] A supporting Affidavit alleged that one year's interest and $2500 of principal were delinquent on the Cohan obligation and that current obligations were unpaid and principal obligations delinquent of more than $13,000. [Cohan v. Elder, R. 67.]

The following day, July 3, 1940, the Elders asked to amend under (s). The Commissioner recommended that they be adjudicated under (s) and the adjudication followed on July 5, 1940. [Cohan v. Elder, R. 62.]

In the *Elder* case, the original petitions for relief under Section 75 were filed in the District Court on July 13, 1937. [Cohan v. Elder, R. 18, 21.] The extension proposal plan, after approval by a majority of creditors, was filed on September 30, 1937 [Cohan v. Elder, R. 21] and confirmed by the Court on May 24, 1938. [Cohan v. Elder,

R. 24.] In September, 1939, the plan was modified by the Court reducing the rate of interest and postponing certain principal payments. [Cohan v. Elder, R. 45.] On appeal to this Court that action was affirmed on June 7, 1940. (112 Fed. (2d) 967.) The adjudications under (s) of July 5, 1940, were sustained on July 15, 1940, by the District Court and that action afterward affirmed by this Court. Under those rulings the Elders were given to and including three more years from whatever date the three-year stay order under (s) was entered and rental fixed, within which to rehabilitate or refinance themselves which would have given them a total of some seven or more years from the time they filed their original petition.

Here again we have identically the same argument advanced in the *Elder* case where the Petition to set aside the adjudication under (s) alleged that "the debtors have had a plan of composition and extension in operation for approximately thirty-three months and have miserably failed to comply with the terms thereunder or as modified by the Court." [Cohan v. Elder, R. 71.]

Furthermore, the case of *Brinton v. Federal Land Bank,* 129 Fed. (2d) 790, cited by Judge Beaumont in his Memorandum Opinion carried the *Elder* case one step further. It held that the property there in question had been discharged from the proceedings under (a-r) by a failure by the debtor for more than three years to even file any offer of composition or extension. The upper court therefore justified the District Judge in having entered an Order authorizing the mortgagee to foreclose. Four months later the debtor filed under subsection (s), thus presenting an almost identical situation with the present

case and Appellees' claim regarding the Commissioner's Order of February 9, 1942, except that in the *Brinton* case, the Order was properly entered by the District Judge and not by the Commissioner who, as we maintain, had no power to enter such an Order. The Circuit Court of Appeals of the Tenth Circuit went on in the *Brinton* case to hold that so long as the mortgagee had not in that intervening four months, completed its foreclosure, the debtor still had a justiciable interest in the property which the Bankruptcy Court continued to have power to administer. This is precisely the situation in our case.

It is further argued (p. 35) that if a farmer considers himself aggrieved "he must file his amended petition within a reasonable time."

This precise point was made in the *Elder* case and this Court disposed of it at page 851 in the following language:

> "Appellant argues, in the alternative, that the court was without jurisdiction to order an adjudication because the amended petition was not made within a reasonable time after confirmation. We see no merit in the argument. The statute says nothing about a reasonable time. The act is to be construed liberally to accord the debtor the full measure of the relief afforded by Congress. *Wright v. Union Central Life Insurance Company,* 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490."

This same point was later presented to and overruled by the Supreme Court in *Wright v. Logan,* 315 U. S. 139, 86 L. Ed. 745, 62 S. Ct. 508.

Judge Beaumont was justified in disregarding the Commissioner's Order under authority of *Brinton v. Federal Land Bank,* 129 Fed. (2d) 740. Appellees argue that

the Court of Appeals in that case failed to recognize that proceedings under (a-r) and under (s) constitute but one proceeding in Bankruptcy. We do not agree. As pointed out in the case of *Klevmoen v. Farm Credit Administration,* 138 Fed. (2d) 608, at 611, the object as well as the procedure in farm debtor cases is entirely different from that in ordinary bankruptcy. Therefore, since the act of going under (s) is most nearly similar to ordinary bankruptcy the cases set out at pages 20 and following of our Opening Brief clearly support the decision in the *Brinton* case.

In the case of *In re Casaudoumecq,* 46 Fed. Supp. 718 (Appellees' Brief p. 40) Judge Jenney reaches a result squarely in conflict with that arrived at by the Circuit Court of Appeals in the *Brinton* case and also in conflict with Judge Jenney's own decision in the case of *In re Los Angeles Lumber Products Co., Ltd.,* 24 Supp. 501, quoted at page 21 of our original Brief.

Appellees claim that Appellants, by their conduct, misled Appellees so that they made no attempt to bring the right of Appellants "to amend under subsection (s) to an early determination". Mrs. Smith's testimony and offers of proof [R. 141-145, 154-155] show that throughout the period in question, negotiations were going on between the parties looking to some amicable arrangement whereby Appellants' interest could be protected without having to file an amended petition under (s). On this state of the Record there can be no estoppel pleaded against Appellants.

Judge Beaumont held that Appellants were not guilty of "contumacious" conduct, and he was clearly right in so doing. The holding in *Wright v. Union Central Life In-*

surance Co., 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196, that "contumacious" conduct is necessary before a debtor's rights can be cut off, is still the law and is being followed by Circuit Courts of Appeals:

Peterson v. John Hancock Mut. Life Ins. Co., 137 Fed. (2d) 396.

If the doctrine of estoppel and of coming into equity with clean hands, should be applied to either side in this case, it should be invoked against Appellees.

Conclusion.

The Record in this case demonstrates that Appellants never intended to waive their rights under Subsection (s) and that no waiver was in fact made. Even if there had been a formal valid waiver made in writing in open court, such waiver would have been void as against public policy.

More than one-half of Appellees' entire brief (pp. 20 to 43, both inclusive), is nothing more than an attempt to persuade this Court to reverse its holding in the case of *Cohan v. Elder,* 118 Fed. (2d) 850, as well as the two chief cases in which the *Elder* case was followed, namely, the Supreme Court decision in *Wright v. Logan,* 315 U. S. 139, and *Brinton v. Federal Land Bank,* 129 Fed. (2d) 740. We therefore urge that Judge Beaumont's Order of September 17, 1943, should be reversed and the proceedings under subsection (s) be permitted to go forward.

Respectfully submitted,

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